

‘Our Precious Union’: The Backstop and the Constitutional Integrity of the UK

Nikos Skoutaris

2019-03-29T12:13:00

The [decision](#) of the Prime Minister Theresa May to stand down if the Parliament approves the Withdrawal Agreement has led a number of passionate proponents of Brexit including Boris Johnson to [change their view](#) of the deal. Still, the Democratic Unionist Party said on Wednesday that the Brexit deal and in particular the backstop posed ‘[an unacceptable threat to the integrity of the United Kingdom](#).’ This is significant not only because the DUP is in a confidence-and-supply arrangement with the Government but also because a number of ardent Brexiteers such as Jacob Rees-Mogg have [said](#) that their stance towards the deal depends on DUP’s position. In light of another meaningful vote, one has to wonder whether the DUP’s fears concerning the threat of the backstop to the constitutional integrity of the UK are justified.

The Backstop

In the [Lancaster House speech](#), Theresa May declared that the aim of the UK is to be outside the single market and the customs union after Brexit. At the same time, her Government has committed to protecting the Good Friday Agreement [by not accepting any physical infrastructure](#) at the Irish land border. As a result, the Brexit negotiations have been haunted by an almost unsolvable riddle. How could the UK and the EU keep a land border between a Member State and a third country open without jeopardising the integrity of the single market?

That riddle has two possible solutions. Either the UK as a whole has to opt for a much closer relationship with the EU than the one described in its red lines or it has to accept that Northern Ireland will have a closer relationship with the European Union than the rest of the country.

Indeed, the latter was the initial EU proposal included in the [draft Withdrawal Agreement](#). Of course, remaining in the EU customs territory and in parts of the single market while the rest of the UK was out of those structures is anathema to many, not least the DUP. This is why the UK insisted and the EU accepted to amend the backstop in the finalised version of the [withdrawal treaty](#) and follow the first option. Barring a deal on free trade that secures a frictionless border, the UK as a *whole* will remain in a "bare bones" customs union with the EU; while Northern Ireland will additionally remain aligned to the single market rules necessary to maintain free movement of goods across the Irish border.

Territorial Differentiation

Despite this significant concession, the Prime Minister and the DUP continued [expressing their concerns](#) over the effect of the backstop on the ‘constitutional integrity’ of the UK. As I have suggested [elsewhere](#), to argue for Northern Ireland – which already differentiates from the rest of the UK even in the area of [protection of fundamental rights](#) – that maintaining regulatory equivalence with the EU would threaten the UK’s constitutional integrity is a gross and needless overstatement.

At the end of the day, within the EU legal order there are a number of cases where [different parts of a member state might have different relationships with the EU](#). The sovereignty of a Member State over these areas has never been challenged just because EU law is applied differently there. More interestingly, the UK has accepted the principle of differentiated Brexit in the case of the UK Sovereign Base Areas in Cyprus that will [remain within the EU customs territory even after Brexit takes place](#).

The Principle of Consent

It has also been suggested that those differentiated arrangements that would apply to Northern Ireland if the backstop is triggered pose a threat to the ‘principle of consent’ and thus the constitutional status of the region as a constituent part of the UK. The proponents of that argument, – including Lord Trimble, one of the architects of the Good Friday Agreement – maintain that the alignment of Northern Ireland with the rules of the single market in the area of free movement of goods could equate to the region ending up [‘as part of an effective EU protectorate.’](#)

[Section 1](#) of the Northern Ireland Act 1998 embodies the ‘principle of consent’ by providing to [‘the people of Northern Ireland the right to determine whether to remain part of the United Kingdom or to become part of a united Ireland.’](#) Both in [McCord](#) and in [Miller](#), the UK courts have clarified that despite the fact that the majority in Northern Ireland opposed Brexit, the UK’s Withdrawal from the EU does not breach the ‘principle of consent’ as it does not change the constitutional status of the region. If that is the settled law, it is rather difficult to accept that it is the backstop – a policy that mitigates the risks that Brexit poses to the Good Friday Agreement and seems to enjoy [majority support](#) across the ethno-religious communities – that threatens the constitutional position of that UK constituent nation. In fact, Article 1 of the Protocol on Ireland/Northern Ireland emphasises that the backstop is explicitly designed in light of the ‘principle of consent’ and does not alter the constitutional status of Northern Ireland.

The Right of Self-Determination

The right of self-determination is the only human right that appears in both Covenants of the [International Bill of Human Rights](#). It has an external dimension that can lead to secession and independence especially with regard to non-self-governing territories. However, as the International Court of Justice has noted, it is not limited to a colonial context. [‘It has an erga omnes character.’](#) However, in

the context of democratic societies, the right is '[normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.](#)'

The Good Friday Agreement encompasses both dimensions of the right of self-determination. As already mentioned, Northern Ireland can secede from the United Kingdom to join a united Ireland, if its people, and the people of the Irish Republic, voting separately, agree to this. At the same time this unique constitutional status is 'accompanied by unusual multi-level governance: regional, north/south and British/Irish'. In that sense, the distinct arrangements that the backstop introduces could be seen as an extension of the internal constitutional differentiation that Northern Ireland already enjoys.

The DUP might feel comfortable with rejecting the differentiation that the backstop introduces. However, there is a significant risk in such uber-unionist position. Restricting the internal dimension of the right of self-determination might lead the people of Northern Ireland to start seriously considering the prospect of [external determination](#) i.e. secession. It is in such situation that the threat to the constitutional and territorial integrity of the '[precious Union](#)' would become really tangible and the stance of DUP could ironically contribute to it.

